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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD PORTILLO,

Defendant and Appellant.

B201915

(Los Angeles County
Super. Ct. No. GA065024)

APPEAL from a judgment of the Los Angeles County Superior Court,
Zaven V. Sinanian, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Respondent.

Edward Portillo, a kindergarten teacher, was charged with 15 counts of child molestation involving seven young girls who had been students in his class. (Pen. Code, § 288, subd. (a).) Six testified at trial.

Diana D. (eight years old at the time of trial) described how Portillo rubbed her “front butt,” indicating the pelvic area of a doll she was given.¹ While the lights were off and the children were watching a video, Diana was sitting on Portillo’s lap. He unzipped her pants, reached his hand inside her underwear and rubbed her “private part.” She felt mad and scared, afraid she would get in trouble. He took her hand and put it on his “wienie,” the “part where he does pee,” and had her rub it back and forth. Portillo put his jacket over their laps. It happened more than once. Afterward, he gave her pretzels. Diana didn’t tell because she was scared “they” would be mad at her.

L.B. (seven at trial) said the first time Portillo touched her private part, she was sitting on his lap as he read a book.² He held the book in front of them and rubbed her with his finger. Another time, when the children were waiting in line for homework stamps, Portillo picked her up, put her on his lap and rubbed her over her underwear with one hand as he stamped her work with the other.

L.B.’s mother Dina testified that, in September 2004, L.B. came home and told her Portillo had touched her private part as she sat on his lap. He was reading a book which he held out in front of him and L.B. as he touched her over her clothes. L.B.’s mother thought if she talked with L.B., she would not sit on his lap and it would not happen again. She did not want to harm Portillo.

On January 24, 2005, L.B. told her mother she did not know why her teacher had touched her private part again. After calling another mother in the class to see if her daughter had said anything about Portillo, Dina went to see him about what L.B. had told

¹ The jury also apparently heard Detective Rebecca Minor’s taped interview with Diana (six at the time); a transcript of this interview was admitted into evidence.

² Based on the transcript admitted as evidence, Detective Minor interviewed L.B. (then five), and Lieutenant Bill Cuevas (whose primary language was Spanish) translated.

her. Portillo said it was “customary” for children to sit on his lap but “he would not be capable of touching her.” He said L.B. may have been confused and the book or paper may have rubbed against her. She said she did not want her daughter to sit in his lap and Portillo agreed. Dina contacted Diana’s babysitter to ask Diana’s mother if she had any problems with Portillo, and Diana’s mother Maria spoke with Diana who described the incidents to which she later testified at trial.

Naomi (eight at the time of trial) said when she was in Portillo’s class, he called her to his chair, said to climb up into his lap, put a black sweater over her lap, unzipped her zipper, pushed away her underwear with his fingers and touched her “privates.” Portillo said, “Does it feel good?” and she told him, “No.” It hurt. The lights were off and the class was watching a movie. Afterward, Portillo gave her pretzels. He also called other girls back to his chair. She had seen Diana D. sitting in Portillo’s lap before.

Naomi’s mother Terry got a call from Dina and spoke with Naomi. She initially denied anyone had touched her, but then described Portillo touching her as she testified at trial. On January 25, 2005, Terry contacted the police and Officer Brenda Iglesias prepared a report. Naomi described the incident to which she testified at trial.³ She said her “imagination” told her Portillo was going to touch her and then he did.⁴ Asked what she meant by her imagination, Naomi said it was “in her head” and “it’s when someone touches you, you have to tell someone.” Terry also took Naomi to a nurse practitioner (Julie Lister) who examined her. Lister, who worked in the sexual assault Violence Intervention Program at Los Angeles County U.S.C. Medical Center, testified regarding her examination and recounted Naomi’s description of what Portillo had done.

Monique J. (nine at trial) testified that she liked how Portillo gave children stickers, but did not like how he touched them in their privates—where they went to the

³ Based on the transcript admitted into evidence, the jury also heard Naomi’s police interview.

⁴ When asked if her imagination had a name, she said “Dorothy.”

bathroom. On the fourth or fifth day of kindergarten, she said, while the class was watching a video with the lights off, Portillo touched Monique's privates as she sat on his legs. He rubbed her privates over her pants with his hand. She was scared. After he touched her, he gave her stickers. Other girls would sit on Portillo's lap. He would call them up by name. He touched her more than one time; the last time was in February.

Monique's grandmother P. testified that she saw Monique take down another granddaughter's pants and underwear inside a playhouse.⁵ The other girl turned around and Monique told her to keep looking at the toy she was playing with. When P. took Monique aside and asked what she was doing, Monique denied doing anything. When P. asked if someone had done the same thing to Monique, she did not respond, but P. continued asking about uncles and cousins, and Monique identified her three-year-old brother. When P. said he could not have done that and asked Monique if it had been someone at school, Monique started to cry and said it was her teacher. When P. asked when, Monique was crying too hard to answer. P. later told Monique's mother.

Monique's mother Crystal asked to move Monique to another classroom because she was not learning at grade level and Monique told her Portillo had touched her private parts. She did not ask for more information. Monique was also having behavior problems and cried when she was being dropped off to school saying she did not want to go. Crystal did nothing more because she did not want to believe it was true. When she heard Portillo had been arrested, she and her husband spoke with Monique and said he had been arrested for doing bad things to kids. Monique asked if it was like what he did to her when he used to give her stickers. Crystal called the police. She did not speak to any of the parents of any of the other children and did not know them or their children.⁶

⁵ Monique said she heard of Portillo's arrest on the news; then said her grandmother told her first and she saw it on the news after that.

⁶ Based on the transcript admitted into evidence, it appears the jury heard Monique's taped interview.

Aubree was nine at the time of trial.⁷ When she was in kindergarten, her teacher shared the room with Portillo, and she would help him sharpen pencils before the bell rang. He touched her private parts in the classroom many times. He would sit in his chair, then pick Aubree up and put her in his lap with her legs straddling his legs and touch her under her panties. After he touched her, she would get stickers and leave.

In February 2005, Aubree's mother Marla saw a news report indicating that a teacher at her daughter's school had been arrested for child molestation. She asked Aubree if any teacher had hurt her. Aubree put her head down and did not answer. Marla dropped the matter. Another student's mother told Marla that Portillo had been arrested. Marla asked Aubree if she liked her teacher (Mr. Lightholder) and she said yes. She had once seen Aubree on Portillo's lap while the children were watching a video. She asked Aubree why she was drawing pictures for Portillo and if he had ever touched her. Aubree put her head down and asked if she was going to get in trouble. Marla did not pursue the issue further at the time but spoke with Aubree again later. Aubree described what had happened with Portillo. She said he hurt her when he touched her. She kept asking if Portillo would get in trouble and if his wife was going to get mad. Six months earlier, Aubree had complained of her genitals hurting. The area was red and irritated. Marla applied ointment for diaper rash which helped but there was additional redness a few months later. Marla had not spoken with the other parents involved.

In Portillo's defense, a number of witnesses testified they had never witnessed Portillo do anything improper. He also presented expert testimony regarding contamination and suggestibility regarding the children's interviews.

In addition, Portillo testified in his own defense, describing his credentials and commendations. He denied the children's accounts; he said he had carpal tunnel in both hands which caused numbness and loss of strength and dexterity. When Detective Minor and Lieutenant Cuevas spoke with him in the principal's office, advising a victim said he

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Aubree's taped police interview was also admitted into evidence.

had touched her, he said, “Isn’t it an alleged victim?” When Detective Minor came to Portillo’s home and said she wanted to speak with him, he said he had expected this to happen, he had been told not to speak with her and he wanted a lawyer. When he previously told Dr. Ronald Markman all the victims had sat on his lap, he meant his knees. When he said he was physically accessible, he meant he was in the same room. He said the accusations were false and arose from the parents’ need to believe their children. He said the children were beguiled and misdirected; L.B. was mistaken.

The parties stipulated regarding a news item that Portillo had been arrested for lewd conduct and pled not guilty to seven counts of child molestation arising from student complaints.

In rebuttal, Dr. Markman testified that Portillo told him he had always been accessible to his students for supportive reasons. He said female students sat on his lap; boys did not. He denied the charges and said the allegations had arisen because the parents got together and compared notes.

During deliberations, the jury submitted a number of notes. It requested a copy of Portillo’s testimony. It asked if the jury had to be unanimous in its verdict. The court responded that whether the verdict was guilty or not guilty, it had to be unanimous; if jurors could not reach a unanimous verdict on a particular count, they were directed to notify the court. The jury requested readback of P.’s and Crystal’s testimony; Monique’s cross-examination; the direct questioning of Portillo “pertaining to his answers regarding children sitting on his lap/knees, allowing children to do so or when it ever happened;” and Crystal’s testimony regarding Monique’s response to her mother’s and brother’s statement about ‘a teacher being arrested for doing bad things.’”

The jury advised the court it had a verdict on seven counts, was hung on 4 counts and had a vote pending on counts relating to Monique, inquiring whether a hung decision was a verdict. After the last readbacks, the jury sent a note indicating it had reached one more verdict but the jury was deadlocked on the remaining counts.

Portillo was convicted as charged on the two counts involving Diana (counts 1 and 2), one count as to L.B. (count 3), the two counts as to Monique (counts 8 and 9) and the two counts involving Aubree (counts 10 and 11).⁸ The court declared a mistrial as to a second count involving L.B. (count 4), the one count involving Naomi (count 7), and third and fourth counts relating to Diana (counts 14 and 15).⁹ The jury found true victim vulnerability allegations.

Prior to his sentencing, Portillo filed motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 and *Faretta v. California* (1975) 422 U.S. 806 as well as a motion for new trial. The court denied the motion to relieve defense counsel, and Portillo withdrew his motion to represent himself. Portillo filed another motion indicating that he would reassert his right to represent himself if he could not reach an agreement with his counsel. Defense counsel filed a motion for new trial, and Portillo filed a supplemental motion along with supplemental *Marsden* and *Faretta* motions. The court denied Portillo's motions to relieve his counsel and proceed in pro per but allowed Portillo to address the court. Portillo withdrew his request to represent himself, and the court denied his motion for new trial.

The trial court sentenced Portillo to a term of 20 years in state prison, calculated as follows: the upper term of 8 years on count 1 plus one-third the midterm (2 years) on each of counts 2, 3, 8, 9, 10 and 11, ordered to run consecutively. In arguing for concurrent rather than consecutive sentencing, defense counsel emphasized Portillo's dedication to teaching for 30 years and the fact he had never been arrested. The trial court responded: "I did observe the children testify, and I did see the trauma that they have suffered. It appears to me that the sentence is appropriate under the circumstances. The pain that is caused to the victims and the victims' families in this case far outweighs

⁸ The jury found Portillo not guilty on two counts involving another child (Sophia V.); two counts involving Victoria T. (who did not testify) were dismissed.

⁹ Counts 4, 7, 14 and 15 were dismissed.

any concerns the court would have for the fact that Mr. Portillo does not have a prior record. I understand that point. It is well taken. However, it appears to me that, having observed the children testify and having observed Mr. Portillo testify and his demeanor and his conduct on the stand, I think . . . the court’s sentence is appropriate”

On appeal, Portillo’s appointed counsel filed a brief in which no issues were raised. (*People v. Wende* (1979) 25 Cal.3d 436.) On June 20, 2008, we advised Portillo he had 30 days within which to submit any contentions or issues he wished us to consider. On July 14, Portillo filed his supplemental response, citing multiple instances of “prosecutorial error.”¹⁰

First, as evidenced by the record, he says, the prosecution failed to establish “the required specific mental state necessary to prove ‘intent.’” The record (including Portillo’s specific citations) does not support this contention. In the context of discussing proposed jury instructions, the trial court did comment there was “no *direct* testimony regarding intent or specific intent or mental state,” and indicated that “bench notes say ‘the court has a sua sponte duty to instruct on how to evaluate the circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish the element of specific intent or mental state.’” (Italics added.) In light of the considerable circumstantial evidence of Portillo’s intent, Portillo’s claim the prosecution failed to prove his intent must fail; no direct evidence was necessary.

Second, Portillo says “‘fundamental unfairness’ injected itself” to such a degree that the “structural integrity” of justice was violated “when trial testimony vouched to the suppression of discoverable information.” Portillo objects that he was deprived of Detective Minor’s “raw written notes” from interviewing the children who testified because they were shredded after she prepared her written report. As the taped interviews were apparently nevertheless available to Portillo as the transcripts of these

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He also apparently filed a petition for writ of mandate and prohibition with our Supreme Court (S163955) on May 30, 2008; this petition was denied on July 7. Portillo requests its incorporation by reference here.

interviews are contained in the record, Portillo has failed to establish any prejudicial error in this regard. (*California v. Trombetta* (1984) 467 U.S. 479.)

Finally, Portillo says the prosecutor used name-calling tactics, misstated trial testimony, breached attorney-client information, appealed to passion and prejudice, warned about danger to the community, vouched for witnesses and failed to correct false or misleading testimony such that prosecutorial errors were so pervasive and inflammatory as to require a reversal of his conviction. Having reviewed the record, we find Portillo's challenges in this regard unavailing. The jury was not present when the prosecutor argued that rebuttal testimony was warranted because Portillo had lied on the stand (or in the exchange regarding direct versus circumstantial evidence of intent which he reiterates), and none of the statements before the jury of which he complains constitute prejudicial prosecutorial misconduct.

We have examined the record and are satisfied Portillo's attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende, supra*, 25 Cal.3d at p. 441.)

DISPOSITION

The judgment is affirmed.

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WOODS, Acting P.J.

We concur:

ZELON, J.

JACKSON, J.